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DEC 1 8 1996
Federal Communications Commission
Office of Secretary

December 18, 1996

HAND DELIVERY

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61

Dear Mr. Caton:

Enclosed herewith for filing in the above-captioned matter are the original and four copies of the Motion for Stay Pending Judicial Review of MCI Telecommunications Corporation.

Please acknowledge receipt by affixing an appropriate notation on the copy furnished for such purpose, and remit the same to the bearer.

Sincerely,

Donald B Verrilli / JLK

Donald B. Verrilli, Jr.

Enclosure

cc: Regina Keeney
Richard Welch
Richard Metzger
Larry Atlas
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DEC 1 8 1996

Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
	)	

MOTION FOR STAY PENDING JUDICIAL REVIEW

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Dated: December 18, 1996

SUMMARY

MCI Telecommunications Corporation hereby moves, pursuant to Section 416(b) of the Communications Act of 1934 and 5 U.S.C. § 705, for a stay pending judicial review of the Second Report and Order herein, adopted October 31, 1996, and released November 22, 1996, 61 Fed. Reg. 59,340. MCI filed a petition for review of the Order with the D.C. Circuit on December 2, 1996.

MCI seeks a stay until the Court of Appeals has had the opportunity to pass on the Order's validity. The Order totally changes the way MCI and all other interexchange carriers do business. It eliminates tariffs, and requires carriers to establish individual contractual relationships with each and every customer of all domestic services. Indeed the Order goes so far as to eliminate tariffs even for customers with whom it will be impossible to form contracts -- so-called casual callers.

If the Order is not stayed, MCI and all other interexchange carriers will be forced to bear the enormous, unrecoverable expense of forming contracts with tens of millions of individual customers. At the same time, the legal status of those newly formed contractual relationships will remain in substantial doubt during the pendency of appellate review. Should the Order be invalidated, the carrier-customer relationship will once again be governed exclusively by tariff. Individual contracts (principally with large business customers) with rates that differ from the tariffed rates will presumably be invalid and potentially

unlawful. A plethora of litigation is certain to result from the effort to convert from tariffs to contacts, followed by a second wave of litigation if carriers must convert back to tariffs. Because the Order works so fundamental a change in prevailing practice -- and imposes such enormous cost and uncertainty -- implementation of the Order should await a final determination of its validity.

A stay to prevent these harms is particularly warranted because the Order fails to provide a sufficient justification for eliminating tariffs. The Commission purported to act under the forbearance authority granted by Congress in Section 402 of the Telecommunications Act of 1996, Pub. L. No. 104-104. But that provision gives the Commission only the right to forbear from enforcing the mandatory tariff filing requirements of Section 203 of the 1934 Act, (47 U.S.C. § 203). It does not authorize the Commission to go further and affirmatively prohibit carriers from filing tariffs should they wish to do so. Moreover, the Order is fraught with contradictions. The Commission purports to eliminate tariffs to guard against the possibility of collusion or price-signalling in the interexchange market, claiming that advance public disclosure of rates, terms and conditions in tariffs facilitates such conduct. Yet the Commission simultaneously requires carriers to continue to make such information public -- just in a different place. If disclosure poses the risks claimed by the Commission, the Order does nothing to ameliorate them.

For this reason, and others, the Order is arbitrary and capricious, and should be stayed.[1]

[1] Pursuant to 47 C.F.R. § 1.45(d), parties have seven days to comment on this motion. Given the immediacy and magnitude of the harm that MCI and others will suffer if the Order goes into effect, MCI requests the Commission to act on this motion immediately after the time for comment has run. If no action is taken by December 26, 1996, MCI intends to seek a stay from the Court of Appeals.

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MOTION FOR STAY PENDING JUDICIAL REVIEW

INTRODUCTION

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STANDARD

Under the familiar test to determine whether an order should be stayed pending review, a stay should be granted where 1) the movant is likely to prevail on the merits of the appeal; 2) the movant will likely suffer irreparable harm absent a stay; 3) others will not be harmed if a stay is issued; and 4) the public interest will not be harmed. See In Re Deferral of Licensing of MTA Commercial Broadband PCS, 61 Fed. Reg. 19623 (May 2, 1996) (citing Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)).

[2/] Pursuant to 47 C.F.R. § 1.45(d), parties have seven days to comment on this motion. Given the immediacy and magnitude of the harm that MCI and others will suffer if the Order goes into effect, MCI requests the Commission to act on this motion immediately after the time for comment has run. If no action is taken by December 26, 1996, MCI intends to seek a stay from the Court of Appeals.

"The test is a flexible one." Population Institute v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986). Relief should be granted if a movant demonstrates "either a high likelihood of success and some injury, or vice versa." Id., citing Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985). An "absolute certainty of success" on the merits is not required. Id. Indeed, a stay should issue "even though [the Court's] approach may be contrary to movant's view on the merits," as long as the movant makes a substantial showing on the other factors. Washington Metropolitan Area Transit, 559 F.2d at 843.

MCI will demonstrate that it is likely to prevail on the merits, and that it will suffer irreparable harm if the Order is not stayed. Because a strong showing on either factor is enough to warrant granting a stay pending judicial review, a stay should be issued.

I. MOVANTS ARE LIKELY TO PREVAIL ON THE MERITS.

A. The Second Report and Order Exceeds The Commission's Statutory Authority.

The 1996 Act confers upon the Commission the limited power to "forbear from applying any regulation or any provision" of the Act if particular conditions are met. § 10(a). In the Order, however, the Commission went much further and adopted a mandatory detariffing policy which prevents carriers from complying with the § 203 tariffing requirement, regardless of the nature of the service, or the type of customer involved.

The history of the Commission's attempts to detariff prior to passage of the 1996 Act highlights why the Commission simply cannot do what it has attempted. Prior to passage of the 1996 Act, the Commission had attempted to alter the tariff filing requirements imposed on carriers by § 203 in two ways. First, it chose to forbear from enforcing the requirements of § 203 against non-dominant carriers. See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Second Report and Order, 91 F.C.C.2d 59 (1982) and Fourth Report and Order, 95 F.C.C.2d 554 (1983). Under this "permissive detariffing" regime, most non-dominant carriers chose not to use tariffs to establish the prices, terms and conditions which governed their relationships with large business customers, but instead ordered those business arrangements through individually negotiated contracts. These same carriers did, however, continue to file tariffs which governed their relationships with the millions of residential and small business customers with whom individual contracts were not negotiated.

In the Sixth Report and Order, 99 F.C.C.2d 1191 (1984), the Commission went further and attempted mandatory detariffing. Carriers were precluded from following the requirements of § 203; all tariffs on file were to be cancelled and no new tariffs could be filed. In 1985, mandatory detariffing was struck down as outside the scope of the Commission's authority. See MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (1985).

Permissive detariffing, or forbearance, which was reinstituted after the Sixth Report and Order was invalidated, was struck down a decade later, in 1994. See MCI Telecommunications Corp. v. AT&T, et al., 114 S.Ct. 2223 (1994). In both instances, courts found that the power given the Commission in § 203 to "modify" the tariff filing requirement did not give it the authority to eliminate that requirement altogether. Citing dictionary definitions, the Supreme Court held that the word modify means "to change moderately or in minor fashion." Id. at 2229.

In the wake of these decisions, Congress altered the Commission's authority under the Act. Congress did not give the Commission the authority to go as far as it had attempted to in the Sixth Report and Order, eliminating one of the Act's requirements, nor did it give the Commission the authority to prohibit carriers from complying with the Act's existing requirements. Instead, it merely gave the Commission the authority to forbear from applying the tariff filing, or other requirements. The scope of this authority is clear: the same dictionaries that the Supreme Court relied on in deciding the scope of the Commission's power to modify define forbear as "refraining from action." See Black's Law Dictionary 329 (5th ed. 1983); Webster's Third International Dictionary 886 (1981) (same); Random House Dictionary 748 (2d Ed. 1987) (same). Thus, Congress clearly gave the Commission the authority to refrain from enforcing the mandates of the Act, including § 203's requirement that carriers must file tariffs, but it just as clearly did not give the Commission the authority to re-write the Act, and prohibit carriers from relying on tariffs to order their affairs, especially with the millions of small customers whose relationship with interexchange carriers is entirely premised on tariffs.

The Commission does not dispute that what it has done moves well beyond the ordinarily accepted definition of forbearance. Instead, it merely argues that "forbear" must be interpreted in accordance with the Commission's historical usage of the word, which is broader than the accepted definition. See Order at ¶ 71. But each example cited by the Commission is either flatly not on point, utterly ambiguous, or an indication that the Commission is occasionally sloppy with language. See, e.g., Order at ¶¶ 71-72.

Critically, the Commission points to nothing indicating that Congress intended to redefine the term "forbear". When construing a statute, it must be assumed that the "legislative purpose is expressed by the ordinary meaning of the words used." Richards v. United States, 369 U.S. 1, 9 (1962). Thus, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108

(1982). In this case the ordinary meaning of the language used in the statute is plainly not broad enough to encompass the action actually taken by the Commission. Nor is there anything to indicate that Congress intended the language to mean anything other than that which it ordinarily means. The Commission's attempt to bootstrap its decision to eliminate § 203's tariffing requirement altogether by relying on its authority to forbear from applying the Act simply cannot stand.

B. The Commission's Actions Were Arbitrary and Capricious.

Quite apart from the absence of statutory authority, the Second Report and Order lacks a reasoned justification. The Commission purported to perform the requisite statutory analysis before "forbearing" from applying the requirements of § 203 by prohibiting carriers from following that statutory mandate.[3/] The Order, however is hopelessly contradictory, and does not satisfy the requirement that agency action represent "a 'rational

---

[3/] The Commission is required by statute to find that three factors are met before it can forbear from applying a statutory requirement. These factors are:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulations or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

connection between the facts found and the choice made.'" Motor Vehicles Association Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., et al. 463 U.S. 29, 43 (1983), quoting Burlington Truck Lines v. U.S., 371 U.S. 156, 168 (1962).

The Order rests principally on the Commission's conclusion that mandatory detariffing satisfied the "public interest" prerequisite to forbearance (§ 10), because any tariffing facilitates "price coordination in the interstate, domestic, interexchange market . . ." Order at ¶ 44; see also Order at ¶ 54 ("tacit coordination of prices for interstate, domestic, interexchange services, to the extent it exists, will be more difficult if we eliminate tariffs, because price and service information about such service provided by nondominant interexchange carriers would no longer be collected and available in one central location"). The Commission likewise relied on this rationale in finding that section 10's other prerequisites were met. See, e.g., Order at ¶ 23 (discussing whether tariffs are necessary to ensure that charges are just, reasonable, and non-discriminatory, and finding that tariff filings "facilitate, rather than deter, price coordination, because under a tariffing regime, all rates and service information is collected in one, central location"); id. at ¶ 37 (discussing whether tariffs are necessary to protect consumers, and finding that "'forbearance will promote competition and deter price coordination, which can threaten competitive benefits'"); id. at 41 ("we believe that eliminating tariffs

. . . will reduce [carriers'] ability to engage in tacit price coordination").

Indeed, the Order rejects permissive detariffing (or true forbearance) based on the view that it "would not eliminate the collection and availability of rate information in one centralized location," and "would create the risk that carriers would file tariffs merely to send price signals and thus manipulate prices." Order at ¶ 61.

Mandatory detariffing simply cannot be justified on this ground. To begin with, the Commission did not find that tariffs caused price coordination. Rather, it acknowledged that "evidence of tacit price coordination in the market for interstate, domestic interexchange services is inconclusive." Order at ¶ 23. More importantly, even if the risk of price coordination were real, the Order would do nothing to ameliorate it. The Order identifies tariffs as <u>the means</u> by which competitors can ascertain pricing information. Yet the Commission ordered carriers to continue to "make information on current rates, terms, and conditions for all of their interstate, domestic, interexchange services <u>available to the public</u> in an easy to understand format and in a timely manner." Order at ¶ 84 (emphasis added). Indeed, the Order requires carriers to publicize the location and hours during which such information may be accessed. Order at ¶ 86.

Thus, the Order requires fully as much public disclosure of rates, terms and conditions as does the tariff regime it displaces. If disclosure risks price signalling and collusion, that risk remains present despite the Commission's decision to detariff. The Order simply will not bring about the principal public policy benefit the Commission claims it will achieve. The only difference between the tariff requirements of section 203 and the public disclosure requirements of the Order is the location of the information. Pursuant to section 203, the information is located at the FCC. Pursuant to the Order, it is available at the carrier's offices. It is inconceivable that this difference could prevent the risks of collusion identified by the Commission. Carriers bent on discovering their competitors rates will have an easy time doing so. Certainly, such a dramatic and costly policy shift as mandatory detariffing cannot be supported by so slender a reed.

Nor do any of the Commission's other articulated rationales survive scrutiny. The Order cannot be justified on the ground that tariffing "removes incentives for competitive price discounting." ¶ 53. According to the Order, carriers will not bother to offer discounts because competitors will know immediately what discounts are offered and will match them before the discount has the effect of attracting new customers. See id. at ¶ 45. This assumption is, however, contrary to the record before the Commission. The Commission itself recognized that the "high churn rate among consumers of interstate, domestic interexchange carriers indicates that consumers . . . are likely to switch carriers in order to obtain lower prices or more favorable terms and conditions." Order at ¶ 21. This rationale also suffers from the same fundamental problem discussed above -- if tariffing did provide a disincentive to offer discount programs because other carriers would learn of them and immediately match them, the Order's disclosure requirements would merely perpetuate the problem.

Nor can the Order be justified on the ground that tariffing precludes carriers from making rapid, efficient responses to changes in demand and costs. Order at ¶ 53. This conclusion is inexplicable. Under the existing rules, carriers can file tariffs on <u>one day's notice</u>. This allows them to alter service plans almost instantaneously in response to competition or other changes in the market. The Commission itself found, however, that in a non-tariffed world, carriers would, at a minimum, be required to provide some form of advance notice to the millions of consumers they serve before certain changes could be made to rate structures. <u>See</u> Order at ¶ 56 (Carriers would "likely be required, as a matter of contract law, to give advance notice of" changes such as rate increases). Thus, the move from tariff to contract is certain to reduce carriers' flexibility -- not enhance it.[4/]

[4/] Indeed, because of the diminished flexibility resulting from mandatory detariffing, in its comments MCI requested that if, interexchange carriers (IXCs) are required to detariff all of their services, Local Exchange Carriers (LECs) be required to do the same. <u>See</u> Comments of MCI Telecommunications Corp., CC Docket 96-61, April 25, 1996, at (continued...)

The Commission also indicated that tariffing imposes costs on carriers that attempt to make new offerings, and that mandatory detariffing is therefore in the public interest. But absent tariffs, carriers will have to enter into new contracts with customers each time they make a new offering. The cost of doing so, which the Commission appears not to have considered, will far outstrip the cost of tariff filings.

Finally, the Commission made no serious attempt to deal with the issue of "casual calling." Casual callers are those who use a carrier's services without having an ongoing relationship with that carrier, such as credit card and collect callers. Carriers cannot enter into contractual arrangements with casual callers prior to the time the call is actually made. Under a tariffed regime, that is not a problem -- the rates charged for calling card or collect calls, as well as the terms and conditions governing those calls, are contained in tariffs, and both the carrier and casual callers are bound by the tariff. Absent tariffs, however, there is no mechanism available to regulate the rates, terms and conditions of the call. The Commission's offhand comment that by using a credit card and completing a call, "casual callers may be deemed to have accepted a legal obligation to pay for any such service rendered," Order at 58

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[4] (...continued)
15-16; Reply Comments of MCI Telecommunications Corp., CC Docket 96-61, May 24, 1996, a6 17. Otherwise, IXCs would be subjected to a significantly greater burden than would LECs.

(emphasis added), does not begin to answer the question of what, as a legal matter, obligates these callers to pay carriers a specific rate for the services they use; what terms and conditions, such as applicable liability limitations, govern the call; and what law carriers and callers must turn to in order to answer these questions.

In short, in articulating the rationale for mandatory detariffing and, in particular, in discussing whether the public interest prong was satisfied, the Commission relied on rationales that do not stand up to even minimal scrutiny. The benefits the Commission identified are illusory, and their existence is belied by other findings made in this very Order. Because the Order is so internally contradictory and unreasoned, it is precisely the kind of "arbitrary and capricious" action which the APA forbids.

II. MCI AND OTHERS WOULD SUFFER IRREPARABLE HARM IF THE MANDATORY DETARIFFING ORDER IS NOT STAYED.

The Order mandates radical change in the way MCI and all other interexchange carriers do business. Presently, as a result of the Supreme Court's ruling in MCI Telecommunications Corp. v. AT&T, 113 S.Ct. 2223 (1994), all of MCI's domestic services to millions of customers are provided under tariff. During the period when the Commission's rules authorized permissive detariffing, the vast majority of MCI's customers received service under tariff because it was far more efficient to do so than to enter into individual contracts with each customer. The Order will require MCI to establish individual contractual relationships with each of these customers, and to do so in a matter of months. That process risks irreparable harm to MCI in at least four distinct ways.

First, the cost of compliance with the Order will be both enormous and unrecoverable. MCI alone is likely to incur costs that run to tens of millions of dollars even to establish contracts using standardized forms with its millions of customers and every other interexchange carrier would be put to the same expense. Should the Order be invalidated, that expense would have been wholly unnecessary. Indeed, invalidation of the Order would impose on MCI a further cost of informing all its customers that the contracts they previously received were no longer valid. It is well established that unrecoverable economic loss constitutes irreparable injury, especially where, as here, the risk of such loss is both certain and great. See Baker Elec. Coop. Inc. v. Cheske, 28 F.3d 1466, 1473 (8th Cir. 1994); Battlefield Cable TV Co., 10 FCC Rcd 10591 (Cable Serv. Bur. 1995); Cablevision of New York, 10 FCC Rcd 12279 (Cable Serv. Bur. 1995).

Second, the process of replacing tariffs with contracts will likely expose MCI and other carriers to an onslaught of litigation. Presumably, state contract and consumer protection law will govern MCI's relationship with its customers. Under the law of many states, it is unclear whether MCI can form contracts with existing customers by virtue of a process that makes new contract terms binding if a customer continues to use MCI after receiving notice of the contract terms. Such a practice may be deemed an unlawful "negative option," necessitating that MCI terminate service and then restore it only to customers who affirmatively request it. Many other unresolved questions about the scope of MCI's new state law duties will likewise be certain to prompt massive consumer class action litigation. MCI and other carriers should not be subjected to this burden in advance of a conclusive determination of the Order's validity.

Third, the Order will prevent MCI from entering into contracts with a substantial class of customers -- casual callers -- which will severely disrupt an important aspect of its business.

Fourth, denial of a stay will cast a pall of uncertainty over the market, particularly with respect to large and mid-sized businesses with which MCI typically enters into special customer arrangements (SCAs). During the pendency of the appeal, it will remain unclear whether existing tariffed SCAs can continue to govern those relationships, or whether existing SCAs must be renegotiated. It will be unclear whether the meaning and enforcement of the SCAs will be governed by federal or state law, and if the latter, which state's law. Because the Order forbids the filing of any new SCAs as of its imminent effective date (¶ 90), all such relationships formed during the pending of the appeal will have to be contractual. Should the Order be invalidated, however, these contractual relationships could be found to be without legal effect. See American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818 (D.C. Cir. 1980). Customers may refuse to pay, or, if they pay at all, may raise subsequent claims based on the statutory requirements of section 202(a) that rates be nondiscriminatory. Carriers would suffer enormous adverse consequences were they required to shift to contractual relationships en masse during the pending of the appeal, only to shift back to tariff relationships should they prevail.

III. NO OTHER PARTY WOULD BE HARMED BY THE GRANT OF A STAY.

No other party would be substantially harmed by the grant of a stay. The relationship between consumers and carriers has been governed by tariffs for over sixty years. For that same sixty years, the Commission has accepted and maintained tariff filings. It cannot seriously claim that it or the public would be harmed merely by maintaining the status quo -- a status quo mandated by the Communications Act -- until the question of the Order's lawfulness can be decided on the merits.

IV. THE PUBLIC INTEREST WOULD BE SERVED BY THE GRANT OF A STAY.

The public interest would be served by the grant of a stay. As discussed above, implementation of the Order would impose significant costs on carriers that would likely be passed on to consumers. A stay preserving the status quo would prevent the confusion and added expense consumers may suffer if carriers are forced to move toward a detariffed environment -- confusion and expense which would be utterly needless if the Order is overturned on the merits.

CONCLUSION

For all the reasons stated above, the Commission should grant a stay pending judicial review of its Second Report and Order.

Respectfully submitted,

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Counsel for Petitioner

Dated: December 18, 1996

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December 1996, a copy of the foregoing document was served by first-class mail, postage prepaid, on the counsel named on the attached list.

Donald B. Verrilli, Jr.